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APOSTASY AND ITS EFFECT ON PRIOR HINDU MARRIAGE.

Christianity and Islam are the two proselytizing religions in India. Recent trends recognise conversions to Hinduism as well, *Muthuswami* v. *Masilamani*[1], *Ratansi Morarji* v. *Administrator-General of Madras*[2], *Durga Prasada Rao* v. *Sundarsanaswami*[3]. According to one learned Judge the religion of a person is what the person professes and does not require recognition by the other persons belonging to that religion[4]. In the cases of spouses resident in India, their personal status and what is frequently termed the status of marriage is not solely dependent on domicile but involves the element of religious creed[5]. Where after marriage, the spouses or any of them change or changes his or her faith, its effect on the rights incident to their prior marriage, particularly as regards its continuation, is not always clear, where the tenets of the new religion in regard to the matter are in conflict with those of the religion under which the marriage had taken place. It is also possible that the prior marriage was a civil marriage or that it had been solemnised outside India. The marriage might be of the monogamous or polygamous type. It might be of the indissoluble or dissoluble pattern. Again, different considerations may operate according as both spouses or only one of them have or has given up the original faith. It is settled that where a Hindu or a Christian changes his faith, the conversion *per se* does not destroy the prior marriage but leaves it subsisting—see *Government of Bombay* v. *Ganga*[6], In the matter of *Ram Kumari*[7], *Gul Mahomed* v. *Emperor*[8], *Hope* v. *Hope*[9]. Interesting questions may arise as to whether a convert who had belonged to a faith permitting polygamy and had a plurality of wives in that faith can on becoming a Christian live with all his wives. It is also clear that if there is any statute providing for annulment of marriage on change of faith by either spouse there would be no difficulty.

The only statute providing for dissolution of marriage on a change of faith by either spouse is the Native Converts Marriage Dissolution Act (Act XXI of 1866). That Act however affords relief only in cases of conversion to Christianity. Also the party concerned should, prior to becoming a Christian, have been a married person of British Indian domicile and shall not be a Christian, Muhammadan or Jew. The Act cannot apply where the conversion is to any other faith, or where the conversion is to Christianity from Judaism or Muhammadanism. Where a married Muslim becomes a Christian, the marriage contracted under the Islamic law would according to that law *ipso facto* stand annulled—see *Amin Beg* v. *Saman*[10], *Abdul Gani* v. *Azizul Huq*[11], *Karan Singh* v. *Emperor*[12], *Resham Bibi* v. *Khuda Baksh*[13], *Iqbal Ali* v. *Mt. Halima*[14]. After the passing of the Dissolution of Muslim Marriages Act (Act VIII of 1939), the position is different where it is the wife that gives up

1. (1909) 20 M.L.J. 49 : I.L.R. 33 Mad. 342.
2. (1929) 55 M.L.J. 478 : I.L.R. 52 Mad. 160.
3. (1940) 1 M.L.J. 800 : I.L.R. 1940 Mad. 653.
4. Per Ramesam J., in *Pakkiam Solomon* v. *Chelliah Pillai*. (1923) 45 M.L.J. 208 : I.L.R. 46 Mad. 839 (F.B.).
5. *Skinner* v. *Skinner*, (1897) L.R. 25 I.A. 34, 41 : I.L.R. 25 Cal. 537 (P.C.).
6. (1880) I.L.R. 4 Bom. 330 (conversion from Hinduism to Islam).
7. (1891) I.L.R. 18 Cal. 264 (conversion from Hinduism to Islam).
8. (1947) Nag.L.J. 73 (conversion from Hinduism to Islam).
9. A.I.R. 1938 Sind 162 (conversion from Christianity to Islam).
10. (1910) I.L.R. 33 All. 90.
11. (1912) I.L.R. 39 Cal. 409.
12. (1933) All.L.J. 733.
13. I.L.R. (1938) Lah. 277.
14. I.L.R. (1939) All. 296.

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Islam. In such a case, section 4 provides that apostasy shall by itself not dissolve her prior marriage but she can move for its dissolution on any of the grounds specified in section 2. If it is the husband that has become an apostate to Islam, the old law will continue to apply and his marriage with his Muslim wife will stand dissolved and he will be free to marry again as a Christian.

In the case of conversion to Hindusim from Islam, the provisions of Islamic law set out above will operate equally in the matter of the extinguishment or subsistence of the previous marital tie. If the convert was originally a Christian and had married according to the tenets of that religion, the apostasy will not put an end to the marriage. If the apostate is the husband, he could under the Hindu law marry again even during the lifetime of his Christian wife. The wife may then under section 10 of the Divorce Act (Act IV of 1869) seek an annulment of the prior marriage as soon as the husband in his new religion has gone through a form of marriage with another woman. If the wife becomes a Hindu while her husband remains a Christian she can obtain freedom only if the husband becomes guilty of marital infidelity.

Where the conversion is to Islam from other faiths and the convert is already married, Muslim law provides a special procedure to get the prior marriage dissolved. The spouse who is not in Islam is to be offered that faith, and in case the offer is rejected, dissolution of the marriage can be granted by the Kazi. The only difference between an Islamic and non-Islamic country in regard to this matter is that in the latter case the convert should wait for a period of three months before relief can be had. It will be recognised that, in affording relief to its own adherent, the rules of Islam trench upon the rights which had attached to the marriage when it was contracted. Thus if the prior marriage had been a Hindu marriage, from the point of view of the spouse continuing in Hinduism, the relationship can under no circumstances be extinguished. If the previous marriage had been a Christian marriage the spouse remaining in Christianity might well insist that the sanctity attaching to a monogamous union should not be defeated by mere change of religion. A real problem thus arises where Muslim law cuts across the incidents that had already attached to the prior marriage, whether under the law under which the marriage had been contracted or under the tenets of the religion to which the spouses had originally belonged. The law of India is not Muhammadan law any more than it is Hindu law or the eccleciastical law of the Christians. By what right then can Muslim law-givers control the incidents of a marriage contracted outside Islam? The clash becomes apparent if regard is had to the outlook in regard to marriage of Christianity, Hindusim and Islam respectively.

Christians regard marriage as "the voluntary union of one man and one woman to the exclusion of all others," *Hyde* v. *Hyde*[1]. It is not a mere contract but a contract affecting status or a status arising out of a contract, *Sottomayer* v. *De Barros*[2]. Under the Common law it was not constituted by a mere contract followed by *concubinatus*. There must be some religious solemnity. The contract *per verba de presenti* should be accompanied by some religious ceremony, *Reg* v. *Mills*[3]. Since the Marriage Act of 1836, various enactments have recognised marriage as a civil contract. Though ever since the Matrimonial Causes Act, 1857, definitely, and prior to that by private Acts of Parliament dissolution of marriages became possible, it could be done only on certain grounds. Change of religion has not been one of the recognised causes either then or now justifying dissolution. Though marriage has ceased to be a lifelong union, the element of exclusiveness has continued to be of its essence and marriage is strictly monogamous.

Among Hindus, marriage is regarded as a relationship created by dharma धर्मोहि संबन्धः[4]. It is a samskara. As soon as the homa and saptapadi are completed it becomes indissoluble. Degradation of either spouse cannot undo it. If the husband becomes a *patita*, the wife will not be subject to his control during

1. (1866) 1 P. & M. 130.
2. (1879) 5 P.D. 94.
3. (1844) 10 Cl. & Fin. 534.
4. Apastamba, II, 6, 13, 11.

the period[1]. If however, he performs penances and is restored to his status the control revives. Even the gravest sins admit of expiation by penances[2]. Marital infidelity of the wife does not annul her wifehood. Infidelity is ordinarily an उपपातक and the penance is गोव्रत or चान्द्रायण[3]. Catamenia removes her sin व्यभिचारे ऋतौ शुद्धिः and repentence restores her rights[4]. Even where she has not undergone penance she will be eligible for "starving allowance." Neither degradation, nor desertion, nor infidelity can destroy the marital tie. In *Subbaraya* v. *Ramaswami*[5], it was observed: "Under the Hindu Law a person who lost caste by being expelled therefrom for specified reasons, forfeited whatever rights he might have had if he had remained in caste. That loss of caste created in him a disability to enjoy the rights incident to his relationship with those who remained within the caste. *But it never broke that relationship.* Whether the relationship be one of husband and wife or any other it *was too sacred to be dissolved,* be the disabilities imposed on the outcaste few or many" (italics ours). In regard to the effect of adultery it was stated in the *Government of Bombay* v. *Ganga*[6], that it would not operate as a divorce though the woman had by her own act destroyed her right to claim domestic and marital rights. There is very little in the Hindu sacred literature on divorce. Apasthamba declares that there can be no separation between the spouses as they have to perform religious acts jointly:

जायापत्योर्नविभागोविद्यते । पाणिग्रहणाद्धि सहत्वं कर्मसु ।[7]

Manu is emphatic that neither by sale nor by repudiation can wifehood be terminated: न निष्क्रय विसर्गाभ्यां भर्तुः भार्या विमुच्यते ।[8] Brihaspati conveys the idea even more forcibly when he states that of him whose wife is not deceased half his body survives. The text is:

यस्य नोपरता भार्या देहार्धं तस्य जीवति ।
जीवत्यर्धशरीरेऽर्थं कथमन्यः समाप्नुयात् ॥[9]

The provision for supersession or abandonment of a wife under certain circumstances[10] does not imply the dissolution of the marriage. As regards the text:

नष्टे मृते प्रव्रजिते क्लीबे च पतिते पतौ ।
पञ्चस्वापत्सु नारीणां पतिरन्यो विधीयते ॥[11]

different explanations have been suggested. In commenting on Manu, V, 157, Medhatithi states that पति in the above text should be understood as पालक or guardian. According to some the text is intended to operate only where the bridegroom dies before saptapadi. Others suggest that it will apply where the first marriage has not been consummated. According to certain others a second marriage would be permissible if the girl had not attained puberty. According to some others the first marriage should not have resulted in conception[12]. The Parasara Madhaviya holds the text inapplicable in the kali yuga. It is in any event fairly clear that the text has not been followed in current practice. Among Hindus, marriage is thus, though not monogamous, at any rate altogether indissoluble.

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1. *See* Mitakshara on Yajnavalkya, I, 77.
2. Manu, XI, 89, 92, 101, 105-106.
3. Manu, XI, 118.
4. Gautama, XXII, 35; Vashishtha, XXI, 12; Yajnavalkya, I, 70-72.
5. (1899) I.L.R. 23 Mad. 171.
6. (1880) I.L.R. 4 Bom. 330.
7. Apastamba, II, 6, 13, 16-17.
8. Manu, IX, 46.
9. Cited by Apararka on Yajanvalkya, II, 136.
10. Manu, IX, 77—85; Yajnavalkya, I, 80.
11. Narada, XII, 97; Parasara, IV, 30.
12. History of Dharmasastra by P. V. Kane, Vol. II, p. 611.

The Muslim conception of marriage is radically different. Regarded as a social institution marriage under the Muhammadan law is essentially a civil contract. It rests on the same footing as other contracts. It is constituted by *ijab wa kabul* or declaration and acceptance[1]. The invariable presence of dower (either agreed upon or implied by law), the absence of religious ceremonies, the possibility of the relationship being confined to a stipulated term as in muta marriages, the provision for dissolution by talak, etc., serve to emphasise the contractual element and its dominance in marriage.

It may not unfairly be contended that when persons belonging to a particular faith marry according to the tenets of that faith, they may be deemed to have subscribed, at any rate, in the eye of the law, to the distinctive characteristics of marriage as understood in that faith. It may also be remembered that even at the present time divorce is not recognised either by Roman Catholics or by Hindus. If therefore the procedure prescribed by Muslim law could be availed of by a person on becoming a Muslim to have his prior Christian or Hindu marriage dissolved it would be tantamount to assisting the party to set at naught the obligations he had incurred under this prior marriage as against the other party, for instance, to keep the tie intact.

It would seem that conversion of both spouses to Islam would render the incidents of their prior marriage alterable by Muslim law. In *Skinner* v. *Skinner*[2], the question was touched upon but not decided. In that case, one Stuart Skinner had, in May 1855, married Charlotte Skinner according to Christian rites at a Protestant church. The spouses were originally adherents of Islam but prior to the marriage had become Christians. Subsequent to their marriage they reverted to Islam and continued in the practice and profession thereof until the death of Stuart Skinner. It was found that after their reversion to Islam the parties had gone through a form of marriage a second time according to Muhammadan law. Disputes arose as to the succession to the property of Stuart Skinner. There was a suggestion that the deceased had divorced Charlotte Skinner according to Islamic law. The alleged divorce was not proved. Lord Watson remarked : " Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance and, it may be of nicety." The observation suggests that where both parties change over to Islam, they may be taken to have agreed to subject their prior marriage to be controlled by the Islamic laws, provided the change of faith was not for ulterior reasons, and that where one of the spouses alone becomes a Moslem the incidents of the prior marriage would remain unaffected. In *Khambatta* v. *Khambatta*[3] a Scotchwoman, Christian by religion, contracted in 1906, at Edinburgh, a civil marriage with one Ibrahim, a Moslem with a British Indian domicile. The parties subsequently came to reside in India, and in 1912, the wife was admitted into Islam. In June, 1922, the husband divorced her by talak and a fortnight later she married a Parsi, Khambatta, under the provisions of the Special Marriage Act, 1872. In May 1933, in a suit by her for dissolution of her marriage with Khambatta on the ground of the latter's misconduct, it was contended that the suit was not maintainable as her first marriage with Ibrahim could not be dissolved by talak and was therefore subsisting. It was held that when the wife became a Muslim, both spouses had, as adherents of Islam, placed themselves under that law and the incidents of their marriage could therefore be controlled by Muhammadan law and the divorce by talak was therefore effective. It would make no difference whether the marriage was a religious marriage or a civil marriage.

Where one of the spouses alone becomes a Muslim, the convert thereafter is governed by Muslim law but the other spouse will continue to be subject to the law to which he or she was all along subject in regard to the incidents of marriage. In such circumstances can the former have the prior marriage annulled by recourse to the provisions of his or her own law? As remarked by Blagden, J., in *Robasa*

1. *See* Ameer Ali, Mahommedan Law, 5th edn., 1929, Vol. II, p. 272.

2. (1897) L.R. 25 I.A. 34: 25 Cal. 537 (P.C.).

3. (1934) I.L.R. 59 Bom. 278.

Khanum v. *Khodadad Bomanji Irani*[1], *prima facie*, to hold that one spouse can by changing his or her religious opinions force his or her newly acquired personal law on a party to whom it is alien and who does not want it is so monstrous an absurdity that carried its own refutation with it. If the apostate seeks the assistance of the Court which law is to govern the matter? Queen Victoria's Proclamation of 1857 states: "We declare it to be Our Royal will and pleasure that none be anywise favoured, none molested or disquieted, by reason of their religious belief and observances but that all shall alike enjoy the equal and impartial protection of the law and we do strictly charge and enjoin all those who may be in authority under Us that they abstain from all interference with the religious belief or worship of any of Our subjects on pain of Our highest displeasure." It is provided by section 223 of the Constitution Act, 1935, (*Cf.* section 112 of the Government of India Act, 1915) that "in matters of contract and dealing between party and party when the parties are subject to different personal laws" the decision should be "according to the law or custom to which the defendant is subject." On the question whether a suit for dissolution of marriage could be regarded as included within the scope of the expression "contract and dealing between party and party," Chagla, J., said in *Robasa Khanum* v. *Khodadad Bomanji Irani*[2]: "It is difficult to believe that Parliament wanted to include matrimonial matters in the compendious expression 'matters of contract and dealing between party and party.' If Parliament intended to invest the High Court with matrimonial jurisdiction, Parliament would have made use of a more appropriate expression. Therefore in our opinion it is not possible to obtain any guidance as to the law which we should administer from section 112 of the Government of India Act of 1915. Mr. Justice Crump in *Benjamin* v. *Benjamin*[3] also expressed a doubt whether the words used in section 112 of the Government of India Act of 1915 cover a matrimonial suit." In passing, it may also be noted that the Supreme Court charters contain a general direction that Courts should give judgment according to "justice and right" and likewise the Letters Patent provide that in the exercise of its ordinary original civil jurisdiction the High Court should apply to each case such "law or equity" as would have been applied by the High Court if the Letters Patent had not been passed. The question is what is meant by "justice and right." That expression would signify that where there is no statutory provision of law the Court should decide the matter according to the principles of justice, equity and good conscience, and that in cases like the present it is such principles that would govern—see *Budansa* v. *Fatima*[4], *Noor Jehan Begum* v. *Eugene Tiscenko*[5], *Robasa Khanum* v. *Khodadad Bomanji Irani*[1]. There is nothing *prima facie* in 'justice and right' or 'justice and equity' that a marriage once validly celebrated should be judicially dissoluble or otherwise capable of being terminated except by death. Turning to the judicial decisions, it has already been noticed that Lord Watson's observations in *Skinner* v. *Skinner*[6] cast a doubt whether a valid Christian marriage could be dissolved on the conversion of one of the spouses to Islam under his new law. The decision of the Judicial Committee in *Skinner* v. *Orde*[7], seems to suggest definitely that dissolution cannot be had that way. There one Helen Skinner, a Christian had married a Christian husband according to Christian rites and there was a daughter born of the marriage. On the death of her husband, Helen Skinner started living with one John Thomas John, also a Christian who was a married man and whose Christian wife was living. The parties became converts to Islam and purported to marry according to Muhammadan law. In considering the question whether Mrs. Skinner by her acts had become unfit to continue as the guardian of her daughter, the Privy Council had to consider an argument that in spite of John Thomas John's conversion to Islam he could not marry Mrs. Skinner as his previous Christian wife was still alive and the marriage with her would continue to subsist notwithstanding anything to the contrary in the law applicable to Mr. John. James, L.J., observed: "The house of the widow (Helen Skinner) became the house of one John Thomas John, a clerk of inferior grade

1. (1946) 48 Bom.L.R. 864.
2. *Ibid* at 878.
3. (1925) 28 Bom.L.R. 328.
4. (1913) 26 M.L.J. 260.
5. A.I.R. 1941 Cal. 582.
6. (1897) L.R. 25 I.A. 34 : 25 Cal. 537 (P.C.).
7. (1871) 14 Moo.I.A. 309 (P.C.).

in the Judge's Court, and they lived and cohabited together as husband and wife, John Thomas John being already the husband in Christian marriage of a living Christian wife. It is suggested that this union was sanctified and legalised in this way—that the widow became a Mahommedan, that John Thomas John became a Mahommedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahommedan form a valid Mahommedan marriage with the widow, the appellant. The High Court expressed doubts of the legality of this marriage; which their Lordships think they were well warranted in entertaining." An instructive case on this matter is the decision in *Rex* v. *Hammersmith Superintendent Registrar of Marriages, Mir Anwaruddin* Ex parte[1]. In that case *A*, an Indian Muslim, contracted in 1913 a civil marriage in England with an English girl-*R*, a Christian. A couple of months later, *R* left him and *A* returned to Madras, where he obtained a decree for restitution of conjugal rights which *R* did not obey. At the same time, *R* commenced a suit in England against *A* for judicial separation alleging cruelty. *A* contested the suit and it was not pressed. *A* who was then in England purported to divorce *R* by a talaknama and sought a declaration in the Divorce Court that his marriage with *R* was at an end or alternatively for dissolution on the ground of adultery. Justice Bargrave Deane dismissed the petition on the ground that it was incompetent inasmuch as the petitioner's place of domicile was not England. He however expressed the opinion that, on account of what had happened, *A*'s marriage with *R* was at an end. In August 1916, *A* applied to the respondent for a license to marry another lady. The Registrar declined to issue a license, whereupon, *A* applied to the King's Bench Division for a writ of mandamus, his argument being that the license was wrongfully denied, his prior marriage with *R* having come to an end as remarked by Bargrave Deane, J., in the earlier litigation. The King's Bench refused to issue the writ. They held that the forum, if any, competent to dissolve the marriage would be that of the husband's place of domicile. That procedure not having been adopted the marriage with *R* was subsisting. Two of the three learned Judges cited also an observation of Lord Brougham in *Warrender* v. *Warrender*[2] as showing that where the parties adopt the form and solemnities of a particular country, where they are, in making a particular contract (such as marriage), the laws of that country afford the only safe criterion of their intention in making that contract and are resorted to by the Courts of the country where the question arises, not *ex comitate* but *ex debito justitiae*. If considerations of justice are the test, then could it not with fair plausibility be contended that where marriage is between members of different religions and domiciles, inasmuch as the woman knows that on marriage she will take the domicile of the husband she might be deemed to have agreed to subject the incidents of their marriage to the law of her husband's domicile. In any event, where members of the same religious persuasion marry in their faith there could be no difficulty in treating the parties as having agreed to have the incidents of their marriage controlled by the laws of the faith to which they belonged. Nor does any difficulty arise where parties, whether belonging to the same or different religious persuasions, contract a civil marriage in India. In such a case the Special Marriage Act, 1872 under which alone the marriage could be contracted provides that it could be dissolved only under the Divorce Act. In the latter case, therefore, dissolution of the marriage by one of the spouses resorting to Islam or by having recourse to any customary procedure cannot be had—see *Andal Vaidyanathan* v. *Abdul Allam Vaidya*[3], *Gnanasoundari* v. *Nallatambi*[4]. The question whether a marriage contracted by parties according to the tenets of the religion to which they belonged could be dissolved by one of them subsequently becoming a Muslim and invoking the provisions of that law has frequently come up for consideration. Judicial opinion is conflicting. One of the earliest cases is the decision in In the matter of *Ram Kumari*[5], where a Hindu woman after her marriage with a Hindu husband according to Hindu rites became a Muslim, and without taking the steps prescribed by Muhammadan law to get her marriage dissolved, married a Muslim according to Islamic

1. (1917) 1 K.B. 634.
2. (1835) 2 Cl. & Fin. 488, 530 : 6 E.R. 1239.
3. (1946) 1 M.L.J. 402.
4. (1945) 2 M.L.J. 80.
5. (1891) I.L.R. 23 Cal. 164.

rites. In holding her guilty of bigamy, the Calcutta High Court expressed the view that if she had resorted to the procedure indicated by Muhammadan law she might have had her first marriage dissolved. The opinion was *obiter*. In *Budansa* v. *Fatima*[1], where the facts were similar, the Madras High Court held that it is the Hindu law that should be applied in such cases to ascertain whether the marriage with the Hindu husband was subsisting despite the wife having become a Muslim. *Chelimatnessa Bibi* v. *Surendranath Sen*[2], *Mussamat Ayesha Bibi* v. *Bireshwar Ghosh Mazumdar*[3], *Mussamat Ayesha Bibi* v. *Subodh Chakravarty*[4] form an interesting trilogy of cases where Hindu women married according to Hindu rites to Hindu husbands had experienced unhappy married lives, got themselves converted to Islam and invoked the provisions of Muslim law to obtain a dissolution of their marriages with their Hindu husbands. The first two cases were not contested and dissolution was granted. The third case followed the other two decisions. Referring to these cases, Blagden, J., remarked in *Robasa Khanum* v. *Khodadad Bomanji Irani*[5], that a Judge should be " very much on his guard against allowing hard cases to make bad law, which, Judges being but human, is very likely to happen, and which, I cannot help feeling did happen in Ayesha Bibi's case." To put it in less picturesque language, *Blagden, J.*, does not agree with the view taken in the aforementioned three cases. Two other decisions of the Calcutta High Court are sometimes cited as lending colour to the view that the marriage contracted in the original faith could be dissolved by one of the spouses becoming a Muslim and following the procedure indicated by Muhammadan law. In *John Jiban Chandra Datta* v. *Abinash Chandra Sen*[6], one Dukhiram, a Christian, had married according to Christian rites a Christian woman, Sudakshina. He subsequently became a Muslim and married a Muslim woman, Alfatunnessa, according to Muhammadan law. The latter marriage was considered to be valid by Henderson and Latifur Rahman, JJ. Referring to the doubt cast by Lord Watson in *Skinner* v. *Skinner*, it was remarked : " In view of this pronouncement it might be difficult to say whether Dukhiram could have divorced Sudakshina by talak, but there is no suggestion that his marriage to Alfatunnessa was not valid." In *Haripada Roy* v. *Krishna Benode Roy*[7], the suit was one for restitution of conjugal rights. Haripada had married according to Hindu rites a Hindu woman, Saroj Nalini, in 1918. The parties lived as husband and wife till 1929 and there were three children of the marriage. The wife went to Calcutta in 1930, her married life proving unhappy, stayed there for a few years receiving education and later on went to Puri as a school mistress. In May 1933, she embraced Islam, offered it to her husband who made no reply. In June 1933, she filed a suit in the Court of the first Munsiff at Alipore for dissolution of her marriage. The husband did not contest the suit. On 15th September, 1933, an *ex parte* decree dissolving the marriage was passed. Sometime later she was reconverted to Hinduism and on that very day she married Krishna Benode Roy, the first defendant, under the Special Marriage Act as amended in 1923. Thereafter Haripada sued for restitution of conjugal rights. It was held that the decree dissolving the marriage with the plaintiff having been allowed to become final and conclusive the present suit would not lie. The observations on the merits were therefore *obiter*. One novel argument which was urged in the case but was repelled may be noted. It was suggested that the decree granting dissolution could be operative only so long as the spouse remained in Islam but that as soon as she reconverted herself to Hinduism the rights of the first husband would revive. In rejecting the argument, B. K. Mukherjea, J., observed : " The proposition is against common sense . . . . . The marriage is . . . . in my opinion dissolved for all the time to come and a suit for restitution of conjugal rights must fail."

A number of decisions have definitely taken the view that the marriage contracted in the original faith cannot be dissolved by one of the parties adopting Islam

1. (1913) 26 M.L.J. 260.
2. Referred to in (1929) 33 Cal.W.N. clxxix.
3. (1929) 33 Cal.W.N. clxxix.
4. (1945) 49 Cal.W.N. 439.
5. (1946) 48 Bom.L.R. 864, 875-876.
6. I.L.R. (1939) 2 Cal. 12.
7. A.I.R. 1939 Cal. 430.

and having recourse to the principles of Muslim law. In *Khambatta* v. *Khambatta*[1] the view has found favour though by way of *obiter* only. *Noor Jehan Begum* v. *Eugene Tiscenko*[2], is another such decision. In that case, two Christians, having a Russian domicile, contracted a civil marriage at Berlin in May 1931. A son was born of the marriage. The spouses separated in 1938 and the wife came to India. The husband went to study medicine at Edinburgh. In June 1940 the wife was living in Calcutta. On 27th June, she became a Muslim and next day sent her husband a cable offering Islam to him. On his refusal, she brought a suit for a declaration of dissolution of her marriage. Inasmuch as the domicile of the parties was not Indian the suit was held to be incompetent as the Court could not exercise jurisdiction. It was, however, observed by Edgley, J., that the principles of Islamic law invoked by the wife were obsolete, and opposed to principles of justice, equity and good conscience. He also held that the prior marriage could be dissolved only under a law to which both parties to the marriage are subject or by statute. The latest decision of the Calcutta High Court is *Sayeda Khatoon* v. *M. Obediah*[3]. In that case the parties who were jews had married according to Jewish rites. Afterwards the wife became a convert to Islam and sought to have her marriage dissolved in the manner provided by Muhammadan law. The relief was refused. Lodge, J. followed the decision of Edgley, J., in *Noor Jehan Begum's case* and held that there is no authority for the view that a marriage solemnised according to one personal law could be dissolved according to another personal law simply because one of the two parties had changed his or her religion. The latest decision relating to this matter is that of the Bombay High Court in *Robasa Khanum* v. *Khodadad Bomanji Irani*[4]. The plaintiff in the case was a Zoroastrian woman who had married in Iran a member of the same community according to Zoroastrian rites. Two sons were born of the marriage. The parties had adopted India as a domicile of choice. The wife became a Muslim and invited the husband also to adopt the religion. On his declining the offer she brought a suit for a declaration that her marriage with him stood dissolved according to the principles of Muhammadan law. Blagden, J., the trial Judge and on appeal Stone, C.J., and Chagla, J., held that the case was one which fell to be decided in accordance with the principles of justice and equity, as stated by the Madras High Court in *Budansa* v. *Fatima*[5], and there was no reason to hold that the prior marriage could be dissolved by a law which was not of general application to both spouses. The view as expressed in this line of cases is of general application. It would make no difference if the first marriage had been contracted in Hinduism, Judaism or Christianity. It is also immaterial whether such prior marriage was monogamous in character or not. It is by the law to which the parties were subject when they married that the subsistence of the marriage even after the apostasy of one of the spouses would fall to be decided. Any dissolution of the previous marriage could be had only by having recourse to the provisions of a law of general application or to a personal law to which both parties to the marriage are subject which has been adopted as the *lex fori* of the country. These conclusions seem to be supported by what is found in books on Anglo-Muhammadan Law.[6] According to Blagden, J., in *Robasa Khanum* v. *Khodad Bomanji Irani*[4], if the prior marriage was a monogamous marriage and one of the spouses had subsequently become a convert to Islam and proposed to marry again under the Islamic law, the spouse remaining in the original faith could by applying in time have the second marriage restrained by an injunction and in any event there would be a remedy in damages available to such person.

S. VENKATARAMAN.

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1. (1934) I.L.R. 59 Bom. 278.
2. A.I.R. 1941 Cal. 582.
3. (1945) 49 Cal.W.N. 745.
4. (1946) 48 Bom.L.R. 864, 870.
5. (1913) 26 M.L.J. 260.
6. Ameer Ali Mahommedan Law, 5th edn., 1929, vol. ii, pp. 383, 384 and Tyabji, Mahommedan Law, section 194-A.